Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

AMERICAN DISPOSAL CO., D.M. DISPOSAL CO., and MURREY'S DISPOSAL CO.,

Petitioners,

v.

RANDY HUME, CHRIS DAVIES, MICHAEL ROGGE and ROBERT TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTION FOR REVIEW

Are the state court claims of harassment and wrongful discharge of four union members who alleged they were retaliated against by their employer for complaining to management and filing grievances through their union over the non-payment of overtime pre-empted by federal labor law?

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RANDY HUME, CHRIS DAVIES, MICHAEL ROGGE and ROBERT TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners American Disposal Co., D.M. Disposal Co. and Murrey's Disposal Co. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in Hume, et al. v. American Disposal, et al.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at 124 Wn. 2d 656 (1994) and reprinted in Appendix A.

JURISDICTION

The Washington Supreme Court issued its final decision in this matter on September 22, 1994. This Court has jurisdiction to review the decisions of state courts under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The National Labor Relations Act (29 U.S.C. § 157) provides in pertinent part:

> "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ."

Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) provide as follows:

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7; . . . [and] (3) by discriminating in regard to hire or

> tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

The Washington State statute, RCW 49.46.100(2), upon which Plaintiffs made their wrongful discharge in violation of public policy claims, states as follows:

> (2) Any employer who discharges or in any other manner discriminates against any employee because such employee has made any complaint to his employer, to the director, or his authorized representatives that he has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter, or because such employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to this chapter, or because such employee has testified or is about to testify in any such proceeding shall be deemed in violation of this chapter and shall, upon conviction therefor, be guilty of a gross misdemeanor.

STATEMENT OF THE CASE

Defendants American Disposal Co., D.M. Disposal Co. and Murrey's Disposal Co.[1] are commonly owned and controlled refuse collection companies engaged in business in

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[1] These companies constitute all the Defendants involved in this dispute.

Pierce County, Washington. Randy Hume, Chris Davies, Michael Rogge and Robert Taylor[2] are former employees of Defendants who sued the Defendants alleging harassment and constructive discharge in violation of public policy.[3] These claims are based upon the employees' contention that they were retaliated against for demanding overtime pay from their employer and filing grievances with their union regarding overtime. A Washington State statute, RCW 49.46.100, makes it a misdemeanor for an employer to discriminate against employees who make wage complaints under state law to their employer or the Washington State Department of Labor and Industries (DOLI).

The Plaintiffs were formerly route truck drivers for one or more of the Defendants. Each drove a one person truck

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2 These individuals constitute all the Plaintiffs involved in this dispute. There are no other parties.

3 A handicap discrimination claim by Taylor and an age discrimination claim by Davies were dismissed by the trial court. An age discrimination claim by Taylor was ultimately dismissed by the State Supreme Court.

and picked up both residential and commercial refuse. All of the Plaintiffs worked in a collective bargaining unit represented by Teamsters Local 313 (the "Union"). Appendix B at B--7 and B--8. Plaintiffs' wages, hours and other terms and conditions of employment were embodied in a collective bargaining agreement between the Defendants and the Union. Appendix B at B--7 and B--8.

In about May of 1988, a former driver named Schwerzler filed an overtime pay claim with the DOLI shortly after he had been terminated by the Company. Appendix B at B--17 and B--18. The State investigated Schwerzler's complaint, and a settlement was reached with Defendants on the Schwerzler claim. Appendix B at B--23 and B--24. The Company then instituted a time clock and written set of Company policies and procedures.

In August of 1988, the Union conducted meetings with all its drivers to discuss overtime. Appendix B at B--3 and B--4, B--9 and B--10. Pursuant to the advice to the Union at the

meeting, a number of drivers began turning in overtime slips. Several grievances under the labor contract were also filed by employees, including Plaintiffs, regarding unpaid overtime. Appendix B at B--19 and B--20. In September, 1988, Defendants settled the outstanding overtime grievances with the Union by paying overtime to nine drivers, including three of the Plaintiffs. Appendix B at B--21 through B--24. Significantly, none of the Plaintiffs filed any claims with DOLI, nor did they participate in any DOLI investigations. Appendix A at A--2; Appendix B at B--5 and B--6, B--11 and B--12.

Plaintiffs claimed that following the grievance settlement, they were subjected to verbal abuse, threats, unwarranted warning letters and had their refuse routes enlarged. Each eventually quit his employment in 1989. Appendix A at A--3.

Two of the Plaintiffs also contended at the trial that their union positions contributed to the Defendants' retaliation against them. Rogge testified that he was part of the union

bargaining team in 1988 and assisted the Union in negotiations, and as such, these roles contributed to the reasons for Defendants' actions against him. Appendix B at B--1 and B--2. Hume testified that part of the reason he was harassed and received warnings was because of his activities as the union shop steward. Appendix B at B--13 through B--16.

At the trial court, the jury found in favor of the Plaintiffs on their claims of constructive discharge and harassment in violation of public policy. The Washington State Supreme Court directly reviewed the trial court's decision and affirmed the finding of harassment and constructive discharge in violation of public policy.

Prior to the trial, Defendants filed a motion for summary judgment contending that the harassment and constructive discharge claims in violation of public policy were pre-empted by federal labor law under the U.S. Supreme Court's decision in San Diego Building Trades Council, Millman's Union

Local 2020 v. Garmon, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959). The trial court denied the motion and the case went to trial on the merits.

The pre-emption issue was raised again on appeal to the Washington State Supreme Court. That Court affirmed the trial court's decision and rejected Defendants' arguments regarding pre-emption of the harassment and constructive discharge in violation of public policy claims. The Court determined that the claims fell under the exception to the Garmon pre-emption doctrine "where the regulated conduct touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not [be inferred] that Congress had deprived the States of the power to act." Garmon, 359 U.S. at 243-44. The Court stated that it had a general prejudice against pre-emption under Garmon and that it was hesitant to find no State jurisdiction, absent clear congressional intent.[4]

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[4] Appendix A at A--23.

The Court then found that the controversy presented to the State Court is different from that which could have been but was not presented to the NLRB. Therefore, the Court concluded that the potential for interference with the federal regulatory scheme was low.[5]

REASONS FOR GRANTING THE WRIT

A. The State Court's Application of Garmon is Inconsistent with U.S. Supreme Court Decisions.

The United States Supreme Court's pre-emption doctrine under Garmon holds that allegations in state court lawsuits which may also constitute unfair labor practices under the National Labor Relations Act ("the Act") fall under the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). This theory was explained in International Longshoremens and Warehousemens Association v. Davis,

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[5] Appendix A at A--25.

476 U.S. 380, 90 L.Ed. 2d 389, 108 S.Ct. 1904 (1986) as follows:

> "When an activity is arguably subject to Section 7 or Section 8 of the Act, the States, as well as the Federal courts, must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with the national policy is to be averted.

International Longshoremens, supra, at 389-90.

The Court in Garmon noted two exceptions to the pre-emption requirement. It held that pre-emption may not be required to where the activity regulated was of "merely peripheral concern" of the National Labor Relations Act, or where the regulated conduct

> "touches interests so deeply rooted in local feeling and responsibility that, in the absence of congressional direction, [it] could not [be inferred] that Congress had deprived the States of the power to act."

Garmon, at 243-44. It is this second exception that the State Supreme Court relied upon in finding that Plaintiffs' claims in the instant case were not pre-empted under the Garmon theory.

This Court has uniformly determined that, where the challenged conduct could have been brought as an unfair labor practice charge, but the deeply rooted state interest in regulating that conduct is strong, the critical inquiry is whether the controversy presented to the state court is identical to that which could have been, but was not presented to the NLRB. Sears Roebuck & Co. v. San Diego District Council of Carpenters, 436 U.S. 180, 197 (1978). Where the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. Sears, supra, at 202.

In determining the nature of the controversy presented, this Court has emphasized that "mere labels are not relevant to the labor pre-emption context; rather, labor pre-emption is concerned with delineating the areas of conduct which must be free from state regulation if national labor policy is to be left unhampered." Local 100, United Association of Journeymen v. Borden, 373 U.S. 690, 698 (1963).

The Plaintiffs claimed in their lawsuit that they were retaliated against because they complained to their Employer and to their Union about overtime pay. This conduct included filing grievances under the labor agreement for overtime pay, discussing overtime with fellow employees, and attending union meetings with other drivers to discuss overtime issues.

There is no question that the foregoing conduct described by the Plaintiffs constitutes conduct prohibited by the Act. The NLRB has specifically found that an employer's retaliation for the identical activities asserted by Plaintiffs constitutes an unfair labor practice prohibited under Section 8 of the Act. See, e.g., APA Transport Corporation, 285 NLRB 124 (1987) (NLRB held that an employer unlawfully discriminated against an employee who questioned his company's overtime practices); Adams Delivery Service, Inc., 237 NLRB 1411 (1978) (NLRB found that an employer unlawfully threatened an employee for submitting overtime requests to management and discharged another employee for

filing an overtime grievance); Quality Broadcasting Corp. of San Juan, 241 NLRB 318 (1979) (NLRB concluded that an employer unlawfully discharged an employee for seeking overtime pay for himself and co-workers).

These cases demonstrate that the conduct asserted by the Plaintiffs is considered by the NLRB to be protected concerted activity under Section 7 of the Act and any actions by the Defendants in retaliation for such activity are unlawful under Section 8 of the Act. Because the State has attempted to regulate conduct which is also prohibited by the National Labor Relations Act, the test is whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the Labor Board. Sears Roebuck & Co. v. Carpenters, supra, at 197.

The Washington Supreme Court found in the instant case that an identical controversy would not be presented to the NLRB under the Sears standard, stating:

> "That an NLRB inquiry would focus on whether the plaintiffs' overtime wage claims were 'protected concerted activity', the state cause of action focuses instead on whether the employees were discharged in retaliation for their overtime claims."[6]

The state court thus misapplied the well-established test set forth in Sears. It only looked at the labels or legal standards which would be applied to the employer conduct in question. This Court's decisions make it clear that it is the conduct in question, not the legal label or conclusion, that determines whether a controversy is identical. Local 100, United Association of Journeymen v. Borden, supra. As this Court noted in Amalgamated Association of Street, Electrical Railway and Motorcoach Employees of America v. Lockridge, 403 U.S. 274, 292, 91 S.Ct. 1901 (1971). "Pre-emption . . . is designed to shield the system from conflicting regulation of conduct. . . . It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." The controversy for the purpose of Sears

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[6] Appendix A at A--25.

embodies an analysis of the substance of the dispute in the two forums. Ths substance of the dispute in either the state court or the NLRB is whether or not the Defendants retaliated against the Plaintiffs because of their overtime complaints.

NLRB case law cited above makes it clear that such allegations, if true, constitute a violation of Section 8 of the Act. The same inquiry was presented to the state court under a wrongful discharge theory. Thus, the conduct, if proven, would constitute both an unfair labor practice under the Act and a discharge in violation of public policy under state law. There simply is no difference in the conduct or controversy in either forum. Plaintiffs could have presented this identical claim to the NLRB, which would have examined the same conduct presented to the state court.

The state court's characterization that the controversy before the NLRB would focus on protected concerted activity is both misleading and erroneous. The question of protected concerted activity is a jurisdictional issue and relates to the

NLRB's governing legal standards. It is not the substance of the controversy, nor does it define the conduct in question. The conduct on which the Board would focus is identical to the conduct in front of the state court. This Court's decisions on "identical controversy" make it clear that it is the conduct in question, not the ultimate legal conclusion, that determines pre-emption. The Washington State Supreme Court did not find that the conduct in front of the NLRB would be different. Indeed, the identical factual issue underlies both claims - were the employees victims of retaliation because of the overtime activities? The Washington State Supreme Court's decision therefore conflicts with this Court's determinations on pre-emption under Garmon.

B. The State Court's Analysis and Conclusions Also Are in Conflict With the Decisions of Several U.S. Circuit Courts.

In Platt v. Jack Cooper Transport Co., 959 F.2d 91 (8th Cir., 1992), the Eighth Circuit found that Garmon pre-

emption applied in an analogous situation. Platt had filed a state court lawsuit claiming that he was discharged in violation of California State law which prohibited the discharge of employees who make safety complaints. The Eighth Circuit applied the Sears pre-emption analysis for challenged conduct which occurs in a context where an unfair labor practice charge could have been filed, but the deeply rooted local interest in regulating that conduct is strong. It stated that the critical inquiry is whether the controversy presented to the state court was identical to that which could have been but was not presented to the NLRB. The court found that Platt could have brought to the NLRB the specific retaliation claim filed with the state court - that he was fired for making safety complaints. Platt was represented by a union and was covered by a collective bargaining agreement which contained terms governing the safety of employees working under the contract. The controversy or conduct at issue was identical in both forums -whether Platt was retaliated against for making such

complaints to his employer. Platt pursued a wrongful discharge in violation of public policy theory in state court. Under the same set of facts, the NLRB would have determined whether Platt was discriminated against for engaging in protected concerted activities in violation of Section 8 of the Act. The Eighth Circuit determined that the conduct in question (retaliation for making safety complaints) was identical in both forums, and pre-emption was therefore required.

The Court also noted that Platt had in fact tried to pursue a claim of discrimination for "union and protected concerted activities" before the NLRB, which was dismissed. He then pursued his state court action. This underscored the Circuit Court's conclusion that there was an "identical controversy" under Sears. While Plaintiffs did not file an NLRB charge in the instant case, they surely could have. The identical factual issue would have been presented to the NLRB as was presented to the state court -- were Plaintiffs retaliated against

for complaining about overtime? The only difference between Platt and the instant case is that here the employees complained about overtime instead of safety.

In Bassette v. Stone Container Corp., 25 F.757, 146 LRRM 2698 (9th Cir., 1994), the Ninth Circuit found that an employee's claim of wrongful discharge under Montana's Wrongful Discharge Act was pre-empted under the Garmon doctrine because his claim constituted an allegation that the employer had engaged in conduct violative of Section 8 of the Act. That Court concluded that the specific conduct before the state court was identical to the conduct that could have been presented to the NLRB - whether or not the employer had failed to honor a term of employment as part of the conditions implemented after an impasse in negotiations with the union representing Bassette. If this allegation was true, the NLRB would find that such employer conduct constituted a violation of the employer's duty to bargain in good faith under Section 8(a)(5) of the Act. Since the state court

wrongful discharge claim was premised on the identical conduct, it was pre-empted. Similarly, in LPIW Local 1054 v. West Coast Industrial Relations Assoc., 775 F.2d 1042 (9th Cir., 1985), the Ninth Circuit found that a union's tort claim against a company's labor consultants was pre-empted under Garmon and Sears because the conduct relied on to prove a crucial element in the state court action was conduct arguably protected by the National Labor Relations Act.

In Parker v. Connors Steel Co., 885 F.2d 1510, 1518 (11th Cir., 1988), the Eleventh Circuit held that where the substance of the dispute is the same under both state and federal law, the state law must yield to the jurisdiction of the NLRB. In that case, the court found that an employee's state law fraud claim was based on conduct that would have been a violation of the employer's duty to bargain in good faith under the Act. Therefore, even though the state claim involved "fraud" and the NLRB's case would necessarily involve "unfair labor practices" or "a duty to bargain in good

faith", pre-emption was required because the underlying conduct, i.e., the "substance of the dispute", was the same under either legal theory.

In Serrano v. Jones & Laughlin Steel Co., 790 F.2d 1279 (6th Cir., 1986), the Sixth Circuit held that an employee's state law fraud claims were based upon conduct which was arguably prohibited by the Act, which requires that an employer bargain in good faith. The plaintiffs alleged that their employer had made fraudulent promises to rebuild its plant to employees and to the union during negotiations. Since the identical conduct also constituted an unfair labor practice which could have been presented to the NLRB, pre-emption under Garmon was required.

All of these Circuit Court cases clearly establish that the Washington State Supreme Court's analysis of the pre-emption doctrine was in error. The Washington State Supreme Court did not determine if the conduct at issue would be identical before the state court and the NLRB - whether or not the

employer retaliated against employees because of their overtime activities. Instead, the court focused upon the legal or jurisdictional conclusion that would be drawn in the two forums, and erroneously concluded that the controversy was not identical. Under the state court's analysis, no actions would ever be pre-empted in the face of a claim under a state statute, because the NLRB would always have to determine whether protected concerted activities existed. This analysis is plainly wrong. The identical conduct and the substance of the dispute underlying the claims presented to the state court could have and should have been presented to the NLRB, and therefore pre-emption under Garmon is required.

C. The Question Presented Has National Importance.

At least 17 states[7] have similar statutes to the one relied on by Plaintiffs in their wrongful discharge claim, stating that

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[7] These include Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island and Utah.

discrimination against persons making wage or overtime complaints is a violation of state law. The opportunity and likelihood for interference with and overlap of NLRB proceedings in situations similar to the instant case is therefore quite high. It is imperative that the U.S. Supreme Court provide clarification to the states on the extent to which actions brought under such state laws are pre-empted under Garmon.

Furthermore, unless pre-emption is applied in this case, individuals in these states could, under similar facts, pursue an NLRB charge first. If unsuccessful, they could then pursue a state court wrongful discharge action. In fact, that situation occurred in Platt v. Jack Cooper Transport, supra; and was a motivating factor for the Eighth Circuit to find pre-emption in that case. This is exactly the type of interference with the federal regulatory scheme that Garmon seeks to avoid.

One of the fundamental purposes of the pre-emption doctrine is to preserve the exclusive jurisdiction of the NLRB

over labor relations matters which come within its specific areas of expertise. Alleged retaliation against employees for complaining to their employer and union and filing grievances under their labor contract about overtime pay is activity that falls squarely under that definition. If the Washington State Supreme Court decision is allowed to stand, it will cause substantial interference with those portions of federally regulated conduct which overlap with state laws also prohibiting the same activities.

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CONCLUSION

The Washington State Supreme Court's conclusion that the Plaintiffs' claims were not pre-empted under Garmon is erroneous and in conflict with several United States Court of Appeals decisions and the applicable decisions of the United States Supreme Court. For the reasons stated, Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 22nd day of November, 1994.

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APPENDIX "A"

[No. 60808-3. En Banc. September 22, 1994.]

RANDY HUME, ET AL, Respondents,

v. AMERICAN DISPOSAL COMPANY,

ET AL, Appellants

[1] Labor Relations -- Jurisdiction -- Preemption by NLRB -- Exceptions. Enforcement of section 7 of the National Labor Relations Act (protected rights of employees) and section 8 of the Act (unfair labor practices) generally is vested exclusively in the National Labor Relations Board. There are recognized exceptions for activity that (1) is a merely peripheral concern of the Act and (2) touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, no implication that states are deprived of the power to regulate the activity arises.

[2] Labor Relations -- Jurisdiction -- Preemption by NLRB -- Status. Preemption of jurisdiction by the National Labor Relations Board is not favored. Clear evidence of congressional intent is required to preempt state jurisdiction.

[3] Labor Relations -- Jurisdiction -- Preemption by NLRB -- Factors. Whether the National Labor Relations Board has exclusive jurisdiction over an employment dispute depends on several factors, including: the nature of state and federal interests in regulation, the potential for state regulation interfering with the federal regulatory scheme, the differences between NLRB proceedings and state legal action, and the available remedies.

[4] Labor Relations -- Jurisdiction -- Preemption by NLRB -- Overtime Claims -- Retaliation. An employee's

claim of unlawful discharge in retaliation for claiming unpaid overtime under RCW 49.46.100, which prohibits, as a matter of state public policy, employer retaliation against employees who assert wage claims, is not within the exclusive jurisdiction of the National Labor Relations Board.

[5] Evidence -- Review - Standard of Review. The admission of evidence is a discretionary determination of the trial court, and it is reviewed under the abuse of discretion standard.

[6] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Substantial Evidence. When the trial record contains ample evidence, including testimony, from which the trier of fact could infer that the plaintiff's claim was proved, a verdict is supported by substantial evidence.

[7] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Dismissal at Close of Plaintiff's Case -- Waiver -- Presentation of Evidence. Claimed error in the trial court's refusal to dismiss an action at the close of the plaintiff's case is waived when a defendant presents evidence after the dismissal is denied.

[8] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Judgment n.o.v. -- Review -- Preservation for Review. When an aggrieved party assigns error to the trial court's denial of a motion for judgment n.o.v. and argues the relevant legal issues in its brief and cites relevant authority and the record, the issue is preserved for appellate review.

[9] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Judgment n.o.v. -- Review -- In General. An appellate court reviews the denial of a motion for

judgment n.o.v. by applying the same standard as the trial court. The denial will be reversed if the appellate court can say, as a matter of law, that the evidence before the jury was insufficient to support the verdict.

[10] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Burden of Production. Evidence is sufficient to take an issue to the jury when the claimant has met the burden of production.

[11] Civil Rights -- Age Discrimination -- Discharge From Employment -- Shifting Burdens of Production -- Initial Burden on Plaintiff. In an action claiming age discrimination in a discharge from employment, the plaintiff has the initial burden of producing evidence sufficient to support findings that the plaintiff (1) was between 40 and 70 years old and (2) was doing satisfactory work (3) when discharged and that (4) the

replacement worker was younger than the plaintiff. Satisfying this standard creates a rebuttable presumption of discrimination.

[12] Civil Rights -- Age Discrimination -- Discharge From Employment -- Shifting Burdens of Production -- Burden on Employer. Once a discharged employee in an action claiming age discrimination has met the initial burden of production, the employer has the burden of producing evidence sufficient to support a finding that the plaintiff was discharged for a legitimate, nondiscriminatory reason. An employer which fails to meet this burden is liable as a matter of law.

[13] Civil Rights -- Age Discrimination -- Discharge From Employment --Shifting Burdens of Production -- Second Burden on Plaintiff -- In General. Once a

discharged employee in an action claiming age discrimination has met the initial burden of production and the employer has responded by meeting its burden of producing evidence of a legitimate, nondiscriminatory reason for the discharge, the burden shifts to the plaintiff to produce evidence sufficient to support a finding that the employer's alleged reason for the discharge is a pretext. The plaintiff can satisfy this burden directly or indirectly by evidence sufficient to create a genuine issue of material fact as to whether the employer's articulated reasons are unworthy of credence. If this burden is satisfied, the case goes to the trier of fact.

[14] Civil Rights -- Age Discrimination -- Discharge From Employment -- Shifting Burdens of Production -- Second Burden on Plaintiff -- Pretext -- Disparate Treatment -- In General. A discharged employee can

demonstrate that the employer's reason for the discharge is a pretext by showing that the employee was subjected to disparate treatment, i.e., treatment different from that accorded younger employees.

[15] Trial -- Taking Case From Jury -- Sufficiency of Evidence -- Judgment n.o.v. -- Review -- Interpretation of Evidence. The evidence is viewed most favorably toward the nonmoving party when reviewing a trial court's action on a motion for a judgment n.o.v.

[16] Civil Rights -- Age Discrimination -- Discharge From Employment -- Shifting Burdens of Production -- Second Burden on Plaintiff -- Pretext -- Disparate Treatment -- Future Impact. For purposes of a claim of age discrimination, a discharged employee's evidence that the employer's conduct might have an

unequal impact in the future without evidence of past or present unequal treatment is insufficient to prove that the employee was subjected to disparate treatment and that the employer intended to discriminate against the employee on the basis of age.

[17] Civil Rights -- Handicap Discrimination -- Elements -- Handicap -- What Constitutes. For purposes of an unfair labor practices claim under RCW 49.60, to be considered "handicapped" an employee must demonstrate (1) the presence of an abnormal condition and (2) discrimination by the employer because of the condition.

[18] Civil Rights -- Handicap Discrimination -- Elements -- Handicap -- Notice to Employer. An employer has no notice and no reason to suspect the presence of an alleged handicap when the employee alleging handicap

discrimination under RCW 49.60.180 has never missed work because of the alleged abnormal condition and has never specifically discussed the condition with the employer.

[19] Costs -- Attorney Fees -- Statutory Provisions -- Partial Statutory Authority -- Segregation of Fees. When recovery of attorney fees is authorized for less than all the claims for which judgment is entered, the attorney fees must be segregated between the claims so that the attorney fee award is limited to compensation for the attorney's efforts expended on the claims for which attorney fee awards are authorized.

[20] Civil Rights -- Law Against Discrimination -- Attorney Fees -- Reduction -- Union Sponsor. The fact that a labor union contributed some of the costs of an

employee's discrimination suit does not affect the award of reasonable attorney fees to the employee.

[21] Employment -- Termination -- Violation of Public Policy -- Statutory Remedy -- Costs -- Limitation. An employee who prevails on a claim of retaliatory discharge in violation of public policy based on RCW 49.46.100 may recover only those costs that are authorized by RCW 4.84.010

JOHNSON, UTTER, and BRACHTENBACH, JJ., dissent in part by separate opinion.

Nature of Action: Four former employees sought damages for harassment and constructive discharge from their former employer. Two of the employees also sought damages for age discrimination, and one of the employees additionally alleged handicap discrimination.

Superior Court: The Superior Court for Pierce County, No. 90-2-00344-8, Brian M. Tollefson, J., on April 2, 1992, entered a judgment on a verdict in favor of: all of the employees on the harassment claim, three of the employees on the constructive discharge claim, and one of the employees on the age discrimination claim. The handicap discrimination claim was dismissed by the court; the remaining claims were rejected by the jury.

Supreme Court: Holding that the harassment and constructive discharge claims were within the trial court's jurisdiction, that the trial court did not abuse its discretion in

admitting evidence, that the harassment and constructive discharge verdict was supported by substantial evidence, and that the handicap discrimination claim was properly dismissed for failure to establish a prima facie case, but that the verdict finding age discrimination was not supported by sufficient evidence, that the age discrimination claim should have been dismissed, that the attorney fees must be segregated between those efforts for which fees can be awarded and those for which fees are not authorized, and that the cost award exceeded that authorized by statute, the court affirms that portion of the judgment awarding damages for harassment, constructive discharge, the handicap discrimination, reverses that portion of the judgment awarding damages for age discrimination and awarding costs and attorney fees to the

employees, and remands the case for recalculation of the costs and fees.

William T. Grimm and Davis, Grimm & Payne, for appellants.

Lawrence Schwerin and Schwerin, Burns, Campbell & French, for respondents.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RANDY HUME, CHRIS DAVIES, MICHAEL ROGGE, and ROBERT TAYLOR,	) 60808-3
Respondents,	) En Banc
v.	)
AMERICAN DISPOSAL CO., a corporation, D. M. DISPOSAL CO., a corporation, and MURREY'S DISPOSAL CO., a corporation,	)
Appellants.	) Filed 9/22/94

DOLLIVER, J.--The defendants, American Disposal Company, D. M. Disposal Company, and Murrey's Disposal Company, are commonly owned and controlled refuse collection companies engaged in business in Pierce County. Former employees of the defendants, Randy Hume, Chris

Davies, Michael Rogge, and Robert Taylor, bring this cause of action, alleging harassment and constructive discharge in violation of public policy. The crux of the employees' claims is that the defendants retaliated against them for demanding overtime pay. In addition, Taylor claims handicap discrimination and, along with Davies, claims age discrimination.

Each of the plaintiffs worked as route drivers for the defendants, collecting residential and commercial waste. Until September 1988, the defendants' policy was rather informal. They had no time clock and generally paid route drivers for 40 hours per week regardless of how many hours they worked. Although some routes could be completed in less than 40 hours, the drivers found that even without lunch breaks, some routes consistently required more than 40 hours.

In August 1988, after learning they were entitled under state law to be compensated, each of the plaintiffs began to record and turn in overtime. Meanwhile, in July 1988, the

State Department of Labor and Industries had begun investigating complaints of unpaid overtime claimed by route drivers not plaintiffs in this case. The investigation was concluded in September when it was discovered that several of the defendants' employees were owed overtime compensation. The defendants settled these claims, changed their overtime policy, and installed a time clock for the drivers. At the same time, however, they instituted a stricter morning schedule and a rule forbidding the drivers to talk to each other on company property.

Although the overtime claims by the drivers in this case were not the direct focus of the state investigation, the result of the investigation had an impact on them, as the relationship between the defendants and their employees continued to deteriorate. At trial, the plaintiffs presented evidence that when they submitted overtime requests, they, along with other drivers, began to suffer verbal abuse and threats. They also began to receive unwarranted warning

letters, some threatening termination if they did not complete their routes within the scheduled 40 hours. When approached by the drivers, the defendants refused to shorten the routes. In fact, three of the plaintiffs testified that their routes were actually enlarged after they complained. The harassment continued until the plaintiffs eventually left their employment in 1989.

The jury agreed that the plaintiffs were wronged, returning a verdict in favor of all four plaintiffs on their wrongful harassment claims and in favor of all plaintiffs except Rogge on their constructive discharge claims. The jury also returned a verdict for Taylor on his age discrimination claim, but rejected Davies' age discrimination claim. Damages awarded to the plaintiffs total $141,726.

The defendants appeal the verdict on several grounds. They also challenge the trial court's award of $169,465 in attorney fees and $45,663 for costs. Plaintiff Taylor cross-appeals the trial court's dismissal of his handicap

discrimination claim. We review this case on certification from Division Two.

I

RCW 49.46.100 prohibits employer retaliation against employees who assert wage claims, and we have held employers who engage in such retaliation liable in tort for violation of public policy under this provision. See Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984). The plaintiffs invoke this provision and seek damages for harassment and constructive discharge they claim they suffered as retaliation for requesting overtime pay from their former employers. Defendants argue, however, that the claims are preempted by federal labor law and are subject only to the jurisdiction of the National Labor Relations Board. We disagree.

Preemption is a purely jurisdictional issue, and its inquiry focuses on congressional intent. See International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380,

391, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986). Congress has long exercised its power to regulate labor relations, and the United States Supreme Court, interpreting Congress' actions in the context of federal labor law, has articulated three branches of preemption. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, gives the federal courts jurisdiction over lawsuits arising from collective bargaining agreements. The Machinists doctrine preempts any attempt by the state to regulate activity that Congress intentionally left unregulated. See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Empl. Relations Comm'n, 427 U.S. 132, 49 L. Ed. 2d 396, 96 S. Ct. 2548 (1976). The Garmon doctrine operates to preempt claims based upon a state law which attempts to regulate conduct that is arguable either prohibited or protected by the NLRA. See San Diego Bldg. Trades Coun., Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 3 L. Ed. 2d

775, 79 S. Ct. 773 (1959). Only the Garmon doctrine is at issue in this case.

In the National Labor Relations Act (NLRA) Congress has provided for centralized administration of its labor policies by creating the National Labor Relations Board (NLRB) and giving it broad authority. The Supreme Court has reinforced this structure by developing the Garmon rule that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Garmon, 359 U.S. at 245. Section 7 of the NLRA, 29 U.S.C. § 157, gives employees the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a) of the Act, 29 U.S.C. § 158(a), identifies as unfair labor practices an

employer's interference with, restraint, or coercion of employees engaging in concerted activity or exercising rights guaranteed in section 7. Thus, when it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 or are prohibited by section 8, regard for the federal scheme requires that state jurisdiction must yield. Garmon, 359 U.S. at 244.

The Supreme Court has refused, however, to apply the Garmon guidelines in a literal, mechanical fashion stating that

> inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 302, 51 L. Ed. 2d 338, 97 S. Ct. 1056 (1977). See also Sears Roebuck & Co. v. San Diego Cy. Dist. Coun. of Carpenters, 436 U.S. 180, 188, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978). The Court has also recognized two exceptions to the basic Garmon doctrine. Preemption of

state jurisdiction is not required "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act", or "where the regulated conduct touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not [be inferred] that Congress had deprived the States of the power to act." (Footnote & citation omitted.) Garmon, 359 U.S. at 243-44.

We begin our analysis of the case at hand with a reiteration of our general prejudice against preemption. Federal preemption can often produce a harsh result, and we are hesitant to find no state jurisdiction absent clear congressional intent. We also note that we are not convinced the statute at issue in this case attempts to regulate the employees' "protected concerted activities" under the NLRA. Although filing overtime grievances may be "protected activity" under the Act, the Washington statute does not attempt to regulate employee grievance procedures. Rather,

the statute regulates employer actions by prohibiting retaliatory discharge. We ultimately find, however, that the employer retaliation regulated by the statute in this case touches a deeply rooted local concern and, therefore, falls under an exception to the Garmon doctrine.

In making this determination, we examine several factors, including the nature of the federal and state interests in regulation, the potential for interference with federal regulation, the differences between the Board proceeding and the state law action, and the available remedies. Farmer, 430 U.S. at 298, 300. In balancing the state's interest of protecting the relationship between employer and employee against the potential of interference with the federal regulatory scheme, we find such interference unlikely.

Claiming that such interference is unavoidable, the defendants cite to several cases in which the NLRB has exercised jurisdiction over disputes involving claims for unpaid overtime. However, while it is clear that an NLRB

inquiry would focus on whether the plaintiffs' overtime wage claims were protected "concerted activity", the state cause of action focuses instead on whether the employees were discharged in retaliation for their overtime claims. Thus, the controversy presented to the state court is different from that which could have been, but was not, presented to the Labor Board. In such instances state jurisdiction is proper. See Hanson v. Tacoma, 105 Wn.2d 864, 869, 719 P.2d 104 (1986). Cf. Campbell v. Lockheed Shipbuilding & Constr. Co., 56 Wn. App. 641, 785 P.2d 459(1990), review denied, 116 Wn.2d 1004 (1991).

Furthermore, we reject the defendants' argument that Washington's statute prohibiting retaliation for wage claims attempts to regulate activity protected under the NLRA. Even if asserting wage claims is protected concerted activity under the NLRA, the statute does not directly regulate this activity. If anything, the statute regulates employer activity prohibited by the NLRA and, thus, is less likely to interfere with the

federal scheme and require preemption under the Garmon doctrine. See generally Sears, Roebuck & Co. v. San Diego Cy. Dist. Coun. of Carpenters, supra at 200.

Finally, we emphasize that RCW 49.46.100 contains a clear legislative expression condemning retaliation by an employer against an employee who asserts a claim for overtime pay as contrary to the public interest. As we recognized in Thompson v. St. Regis Paper Co., supra, the tort of discharge against public policy was designed to balance the interests of both the employer and employee and to vindicate an important public policy. The plaintiffs' claims are based upon a statute which reflects a legitimate local concern rooted in a strong and clearly articulated public policy.

We find, therefore, that this cause of action falls under an exception to the Garmon preemption rule and that the trial court properly exercised jurisdiction over these claims.

II

The defendants also challenge the harassment and constructive discharge verdicts on the ground that they are based on insufficient and improperly admitted evidence.

The defendants argue that the trial court erred in admitting testimony of nonplaintiffs Jerry A. Doty, Wesley Lantz, Jr., and Larry Schwerzler, former employees of the defendants. In support of this assertion, the defendants cite to a Sixth Circuit case in which the testimony of nonplaintiff employees was improperly admitted because it did not concern similar conduct by the employer and because it was not offered as proof of pattern. See Schrand v. Federal Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988). In our view, the trial court correctly found that the testimony of the former employees regarding their experiences with the defendants was relevant to the issue of the defendants' intent, plan, and pattern regarding the alleged harassment.

The admission or refusal of evidence lies largely within the sound discretion of the trial court and will only be reversed upon a showing of abuse of that discretion. Maehren v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938 (1981); State v. Lynch, 58 Wn. App. 83, 792 P.2d 167, review denied, 115 Wn.2d 1020 (1990). Defendants have made no such showing, and we find no error.

Furthermore, we reject the defendants' contention that the harassment and constructive discharge verdicts are not supported by substantial evidence. The record contains ample evidence from which the jury could infer harassment and constructive discharge, including the testimony of each plaintiff. We affirm the verdict.

III

Next, we consider Taylor's age discrimination claim. The defendants contend that the trial court erred when it denied their motion for dismissal at the close of Taylor's case. By presenting evidence in their own behalf, however, the

defendants waived any error regarding that motion. See Carle v. McChord Credit Union, 65 Wn. App. 93, 97 n.3, 827 P.2d 1070 (1992); Goodman v. Bethel Sch. Dist. 403, 84 Wn.2d 120, 123, 524 P.2d 918 (1974); Jones v. Bard, 40 Wn.2d 877, 880, 246 P.2d 831 (1952). The defendants also contend that the trial court erred by failing to grant their motion for a judgment notwithstanding the verdict. They argue that Taylor produced no evidence from which the jury could reasonably find that they intentionally discriminated against Taylor on the basis of his age. Although Taylor urges otherwise, we find this issue to be properly before the court because the defendants have assigned error to the trial court's denial of their motion for judgment n.o.v., and they argue the relevant legal points in their brief complete with citations to authority and the record. We review the issue and find there is no substantial evidence to sustain the verdict in favor of Taylor on his age discrimination claim.

In reviewing a denial of a motion for judgment n.o.v., we apply the same standard as the trial court and reverse only if we can say, as a matter of law, that the evidence is insufficient to support the verdict. Industrial Indemnity Co. of the N.W., Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). To question the sufficiency of the evidence is to question whether the burden of production has been met, and when this burden has been met, the evidence is sufficient. See Carle, 65 Wn. App. at 98.

In an age discrimination case, the burden of production is divided into three stages, patterned after McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). First, the plaintiff must produce evidence to support findings that he (1) was between 40 and 70 years old, (2) was discharged, (3) was doing satisfactory work, and (4) was replaced by a younger person. Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 362, 753 P.2d 517 (1988); Carle, 65 Wn. App. at 99. Evidence of

these elements creates a rebuttable presumption of age discrimination. Second, the defendant has the opportunity to rebut this presumption of discrimination with evidence that the discharge was for nondiscriminatory reasons. Carle, 65 Wn. App. at 100. If the defendant meets this burden, the third prong of the McDonnell Douglas test requires the plaintiff to produce sufficient evidence that defendant's alleged nondiscriminatory reason for discharge was a pretext. Grimwood, 110 Wn.2d at 364; Carle, 65 Wn. App. at 101. "When all three facets of the burden of production have been met, the case must be submitted to the jury." Carle, 65 Wn. App. at 102.

The first and second facets have clearly been met in this case. Taylor produced evidence that he was over 40 when he left his employment with the defendants, that he was doing satisfactory work, and that he was replaced by younger workers. He also presented evidence that he suffered harassment by his employer that eventually caused him to

leave his job. Taylor claims this harassment was part of a larger plan to eliminate older workers from the defendants' employ.

The defendants responded that the actions allegedly driving Taylor to quit his job were not motivated by age discrimination. To counter Taylor's assertion that they deliberately maintained an unreasonable work schedule designed to shake out older workers, they produced testimony and evidence that their overall routes lengths were reasonable for the industry and that Taylor himself completed his route schedule in an average of less than 40 hours per week from September 1988 through July 1989. They also testified that the warning letters issued to Taylor were part of a legitimate employee disciplinary procedure, pointing out that Taylor never received any written reprimands for not completing his routes on time. In addition, they also testified at trial that they employed 10 drivers over 40 and 2 drivers over 50.

The critical issue, then, is whether Taylor produced sufficient evidence of discriminatory intent. His evidence must be sufficient to create a genuine issue of material fact that the defendants' articulated reasons were a pretext for a discriminatory purpose. Grimwood, 110 Wn.2d at 364; Carle, 65 Wn. App. 101 n.11. Taylor may do this either directly or indirectly.

In age discrimination cases, a plaintiff may demonstrate pretext or discriminatory intent by showing disparate treatment or disparate impact. E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 909, 726 P.2d 439 (1986). Both parties agree that the theory of this case is disparate treatment, not disparate impact. Thus, in order to meet his burden, Taylor must produce evidence that he was treated differently than younger employees. We note that in considering whether he met this burden, we view the evidence in a light most favorable to Taylor. Kallevig, 114 Wn.2d at 915.

Taylor's claim of discriminatory intent essentially rests on the fact that the defendants knew the pace of the routes was too much for the older workers and that if the routes were not restructured the older workers could not make it to retirement age. Taylor's evidence includes expert testimony that the defendants' route lengths were longer than the industry standard, testimony that the defendants fired a fellow employee, Jerry Doty, after having received a medical opinion that Doty was unable to finish his routes on time because of his age, and testimony that Vice President Hawkins knew that age was a factor for some employees who were having trouble finishing their routes on time. Even this knowledge, however, is insufficient to demonstrate disparate treatment on the basis of age.

Taylor attempts to base his age discrimination case on the fact that the defendants knew his age would eventually prevent him from being able to perform his job. This simply does not constitute age discrimination. There is insufficient

evidence from which a jury could infer that the defendants treated Taylor differently than younger workers or that they intended to discriminate against him on the basis of his age because Taylor's evidence shows the routes for all the employees were of comparable length and employees of all ages received warning letters. At most, his evidence would be relevant to an age discrimination case based on an adverse impact, a theory under which an employer's facially neutral policy is discriminatory because it improperly impacts a protected group of employees. This theory, however, was not argued to the trial court, and the evidence presented in this case does not establish a complete adverse impact claim.

We find that Taylor failed to produce sufficient evidence of the defendants' intent to discriminate against him on the basis of his age. We, therefore, reverse the trial court's denial of the defendants' motion for judgment n.o.v. on Taylor's age discrimination claim.

IV

In 1973, the Washington Legislature amended its Law Against Discrimination to include a prohibition against employment discrimination based on physical, mental, or sensory handicaps. See RCW 49.60.180. Under this provision, Taylor claims that the defendants unlawfully discriminated against him. The trial court dismissed Taylor's handicap claim at the close of his case, noting that Taylor had not produced sufficient evidence that his condition constituted a "handicap" or that the defendants had sufficient notice of his condition to be held liable for handicap discrimination. We agree that Taylor failed to present a prima facie case of handicap discrimination and, therefore, affirm the trial court.

Washington's anti-discrimination statute does not define "handicap" but we have adopted the definitions promulgated in WAC 162-22-040. See Jane Doe v. Boeing Co., 121 Wn.2d 8, 16, 846 P.2d 531 (1993). To be considered "handicapped" for the purposes of an unfair labor practices

claim, a plaintiff must show "both (1) the presence of an abnormal condition, and (2) employer discrimination against the employee plaintiff because of that condition." Doe, 121 Wn.2d at 16. Although the question of whether an individual is "handicapped" under RCW 49.60 is one of fact for the jury, Phillips v. Seattle, 111 Wn.2d 903, 909-10, 766 P.2d 1099 (1989), the issue may only be properly submitted to the jury if supported by sufficient evidence.

The bulk of Taylor's evidence goes to establish that he suffered from an abnormal condition under WAC 162-22-040. Taylor relies on the testimony of his family physician, Dr. Stephen Egge, that he was suffering from "overuse syndrome" in his hands as early as 3 years before he left his employment and that Dr. Egge diagnosed him with "mild carpal tunnel" syndrome in July 1989, approximately 1 month before Taylor left his employment with the defendants.

Defendants argue that "overuse syndrome" is too vague to be classified as a "medically cognizable or diagnosable"

condition under WAC 162-22-040(1)(b)(i). They also argue they had no reason to know Taylor might be handicapped. Although Taylor had made intermittent complaints of pain in his hands, he submitted official medical reports to the defendants in 1986 and 1988 indicating he suffered from no medical conditions. While Taylor was diagnosed and treated for carpal tunnel syndrome after he left his employment, he did not seek medical treatment for his hands from October 1988 until July 1989. There is no evidence that Taylor discussed the results of his July 1989 medical visit with the defendants.

On this issue of notice, Taylor argues that the defendants should be held liable regardless of whether they had specific notice his condition met the WAC definition of a handicap condition. In his support, Taylor cites Kimbro v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989), cert. denied, 498 U.S. 814 (1990). "As long as the employer is on notice that an employee suffers from a serious medical

condition, it may be liable under the handicap discrimination law." Kimbro, 889 F.2d at 877 n.6. We find, however, that the evidence, viewed in the light most favorable to Taylor, is insufficient to establish such notice to the defendants.

Unlike Taylor, the employee in Kimbro had missed work several times with severe migraines and had discussed the severe nature of his condition with his supervisors. Because the employer's knowledge of the employee's medical condition was clear, the court found that it had notice of the handicap, even though the employer did not know that severe migraines constituted a handicap under Washington law. Kimbro, 889 F.2d at 876-77. In this case, however, Taylor produced no evidence that the defendants knew or had reason to know that his hand discomfort constituted a serious medical condition.

Although Taylor testified that he complained about pain in his hands and requested transfer to a position that would not require him to use his hands as much, there is no evidence

that he specifically discussed the nature of his condition with his employer at the time he made the requests. Similarly, the union representative who contacted the defendants to request a transfer for Taylor asked for a job "less stressful" for Taylor's hands without discussing the nature of Taylor's condition. At the time the requests were made, Taylor had not missed any work due to the pain in his hands, and he was successfully completing his routes in less than 40 hours per week. Without deciding whether Taylor's evidence was sufficient to satisfy the first element, we hold this evidence to be insufficient to support a conclusion that the defendants had notice of Taylor's alleged condition and, therefore, that they discriminated against Taylor because of that condition in violation of RCW 49.60.180. We affirm the trial court's dismissal of Taylor's handicap claim.

V

We next consider the issue of attorney fees. The trial court awarded $169,465 to the plaintiffs as attorney fees for the

successful constructive discharge and age discrimination claims as authorized by RCW 49.48.030 and RCW 49.60.030(2). The defendants challenge this award as unreasonable, arguing in part that the trial court failed properly to segregate the award. We, therefore, reiterate our previous holdings on segregation of attorney fees.

If, as in this case, an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988); Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 66, 738 P.2d 665 (1987); Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726

P.2d 8 (1986); Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 859 P.2d 26 (1993).

> [T]he court must separate the time spent on those theories essential to [the cause of action for which attorneys' fees are properly awarded] and the time spent on legal theories relating to the other causes of action. . . . This must include, on the record, a segregation of the time allowed for the [separate] legal theories. . . .

Travis, 111 Wn.2d at 411. Where, however, the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees. Pannell v. Food Servs. of Am., 61 Wn. App. 418, 447, 810 P.2d 952, 815 P.2d 812 (1991), review denied, 118 Wn.2d 1008 (1992).

As the case stands, attorney fees are recoverable only for the successful constructive discharge claims under RCW 49.48.030. Attorney fees are not recoverable for the harassment claims, Rogge's unsuccessful claim of constructive discharge, both age discrimination claims, and Taylor's handicap discrimination claim. While we recognize that these

claims are related and to some extent rest on a common core of facts, we remand the attorney fees award to the trial court for recalculation to reflect our disposition of Taylor's age discrimination claim.

Finally, we reject defendants claim that the trial court erred when it refused to reduce the attorney fee award by the amount of fees contributed to the plaintiffs by their union. The defendants' arguments are not convincing. It is unlikely that the plaintiffs and their attorneys will receive double payment because the union payments will be used to cover fees not recoverable from the defendants and because the plaintiffs have agreed to reimburse the union if necessary. Furthermore, because attorney fees are authorized under the remedial statutes to provide incentives for aggrieved employees to assert their statutory rights, it would be counterproductive to reduce attorney fee awards based on union support. See Holland v. Boeing Co., 90 Wn.2d 384,

392, 583 P.2d 621 (1978). The trial court did not abuse its discretion in this matter.

VI

We next address the issue of costs. The trial court had a costs award to the plaintiffs totalling $45,663. The defendants challenge this amount, claiming that the trial court improperly awarded expanded costs to the plaintiffs without statutory authority. We agree.

Costs have historically been very narrowly defined, and RCW 4.84.010 limits cost recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses. Nordstrom, Inc. v. Tampourlos, 107 Wn. 735, 743, 733 P.2d 208 (1987). Civil rights cases stand as an exception to this rule because the Legislature has expressly authorized recovery of actual costs of the litigation, including expert witness fees, facsimile and copying expenses, cost of depositions, and other out-of-pocket expenses. See RCW 49.60.030(2); Xieng v. Peoples Nat'l Bank, 120 Wn.2d 512,

525-30, 844 P.2d 389 (1993); Blair v. Washington State Univ., 108 Wn.2d 558, 740 P.2d 1379 (1987). Absent a statute that expressly allows expanded cost recovery, however, plaintiffs are not entitled to such generous cost awards. For example, in Nordstrom, Inc. v. Tampourlos, supra, we refused to award extended costs to successful plaintiffs under the Consumer Protection Act, finding that an expanded recovery was unwarranted. Nordstrom, 107 Wn.2d at 743.

Plaintiffs argue, however, that the cost award is important to provide incentive for plaintiffs who enforce this tort of retaliatory discharge in violation of public policy. Citing our decision in Blair v. Washington State Univ., supra, the plaintiffs draw a close analogy between their constructive discharge claims and civil rights claims arguing that an expanded cost award is important to provide an adequate remedy for plaintiffs who succeed in holding their employers liable for violating public policy. They therefore request that this court expand the realm of recoverable costs beyond the

statutorily defined costs in RCW 4.84.010 to match the costs available under Washington's Law Against Discrimination and RCW 49.60.030(2).

Before the federal and state civil rights statutes were amended to make expanded costs available to prevailing plaintiffs, this state, in Blair v. Washington State Univ., supra, joined the growing trend to allow prevailing civil rights plaintiffs to recover reasonable expenses in addition to the limited costs defined under RCW 4.84.010. Blair, 108 Wn.2d at 572-73. Our goal was to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations. Blair, 108 Wn.2d at 573. We refuse now, however, to extend our reasoning in Blair to make expanded costs available outside the civil rights context. Plaintiffs who prevail under the narrow tort of retaliatory discharge in violation of public

policy based on RCW 49.46.100 are limited to recovering the narrow statutory costs authorized in RCW 4.84.010.

We, therefore, remand for a recalculation of costs.

VII

In summary we hold as follows: (1) The trial court properly exercised jurisdiction over the harassment and constructive discharge claims based on RCW 49.46.100 because such claims fall under an exception to the federal Garmon preemption doctrine. (2) The trial court did not abuse its discretion in admitting testimony of the plaintiffs' former co-workers. (3) The harassment and constructive discharge verdicts are supported by substantial evidence. (4) The trial court erred in its denial of the defendants' motion for judgment n.o.v. on Taylor's age discrimination claim because Taylor failed to produce sufficient evidence of the defendants' discriminatory intent. (5) Taylor's handicap discrimination claim was properly dismissed for failure to establish a prima facie case. (6) The attorney fees and costs

awards must be recalculated to reflect our disposition of Taylor's age discrimination claim. (7) The cost award for tort claims based on RCW 49.46.100 is limited to the statutory costs available under RCW 4.84.010.

The case is remanded to the trial court for further proceedings consistent with this opinion.

[Signed]

WE CONCUR:

[Signed]

[Signed]

[Signed]

[Signed]

[Signed]

Hume v. American Disposal Co.
Majority by Dolliver, J.
Concurrence/dissent by Johnson J.

60808-3

JOHNSON, J. (concurring in part, dissenting in part) -- I concur in parts I, II, IV, V and VI of the majority opinion. I dissent, however, to part III, discussing Taylor's age discrimination claim. The majority unnecessarily confuses the standard of review on this issue, and, in doing so, reaches the wrong result.

Taylor's age discrimination claim was tried before a jury and the jury rendered in Taylor's favor. The trial judge denied Defendants' motion for a judgment n.o.v. on this issue and the Defendants now appeal the trial court's decision.

When we review a trial court's decision to deny a motion for judgment n.o.v., we apply the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (quoting *Industrial Indem. Co. of N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520, 7 A.L.R. 5th 1014 (1990)). A judgment n.o.v. is appropriate only if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is not substantial evidence or a reasonable interference to sustain a verdict for the nonmoving party. *Hizey*, 119 Wn.2d at 271 (quoting *Kallevig*, 114 Wn.2d at 915-16). If the majority had applied this standard, it would have affirmed the judgment of the trial court on this issue.

However, rather than limiting its inquiry to whether the evidence in this case was sufficient to sustain the verdict,

the majority confuses the standard of review and instead asks whether Taylor's evidence was sufficient to create a genuine issue of material fact on the issue of discriminatory intent. Majority, at 13. This question is appropriate when we are reviewing a motion for summary judgment, not judgment n.o.v. This error apparently occurred because the majority relies on *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988), a case involving review of a summary judgment adjudication in an age discrimination case.

Appellate review of summary judgment and judgment n.o.v. are not equivalent, and it is improper to impart the relevant inquiry from one standard of review to another. An appellate court reviewing a motion for summary judgment engages in the same inquiry as the trial court a reviews the

motion de novo. *Herron v. Tribune Pub'g Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987). When reviewing a motion for summary judgment, the court considers all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Because a grant of summary judgment is an adjudication without a trial, appellate courts must adhere to a stricter standard of review in order to protect a party's right to a trial on the merits.

In contrast, appellate review of a motion for judgment n.o.v. takes place after there has been a full adjudication on the merits. It is no longer the role of the court to evaluate the credibility of the evidence. Nor is it the role of the reviewing court to determine whether it would have reached the same

result as the jury, given the facts established at trial. Instead, the sole function of the appellate court when reviewing a motion for judgment n.o.v. is to establish whether "as a matter of law that there is no evidence or reasonable inference therefrom to sustain a verdict for the opposing party". *Miller v. Payless Drug Stores of Wash., Inc.*, 61 Wn.2d 651, 653, 379 P.2d 932 (1963).

Because the majority adopts the analysis in *Grimwood* and applies the standard of review applicable to summary judgment, the majority complicates the review by focusing on the burdens of production in an age discrimination case. In *Grimwood*, we adopted the federal *McDonnell Douglas* test to establish the elements of an employee's prima facie discrimination case and to allocate the procedural burdens of production. *Grimwood*, 110 Wn.2d at 362; *McDonnell*

Douglas Corp v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). This analysis was necessary to establish whether the plaintiff's evidence created a genuine issue of material fact because the nature of the burden establishing nonexistence of a material fact depends on who bears the burden of proof at trial and what standard of proof is required. Jack H. Friedenthal et al., *Civil Procedure* § 9.3, at 445 (2d ed. 1993).

Where, as here, we are reviewing a motion for judgment n.o.v., this analysis is not only unnecessary, it confuses the issue because these allocated burdens are only pertinent at various stages of pretrial and trial proceedings. *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 522, 844 P.2d 389 (1993). Once there has been an adjudication on the merits,

> issues concerning the employer's burden merge into the ultimate disposition on the issue of discrimination made by the trier of fact.
>
> . . . .
>
> > Issues of the plaintiff's prima facie case, the employer's burden to rebut with a legitimate nondiscriminatory reason, and the employee's showing of pretext are irrelevant once all the evidence is in.

(Citations omitted.) *Xieng*, 120 Wn.2d at 522 (quoting *Burnside v. Simpson Paper Co.*, 66 Wn. App. 510, 524, 832 P.2d 537 (1992), *aff'd*, 123 Wn.2d 93, 864 P.2d 937 (1994)).

Thus, our sole focus in this case is whether the evidence presented was sufficient to sustain a verdict in Taylor's favor. I find that it was. Taylor's claim was essentially that his employers deliberately and systematically maintained an unreasonable work schedule that prevented older workers from staying on the job until retirement age. In support of this claim, Taylor presented expert testimony

that the Defendants' routes were longer than the industry standard. He further produced evidence that the Defendants fired a fellow employee after having received a medical opinion the employee was unable to finish his routes on time because of his age. Lastly, Taylor produced evidence that the vice president knew age was a factor for some employees who were having trouble finishing their routes on time, but nevertheless maintained the route schedules. From this evidence the jury concluded the Defendants discriminated against Taylor based on his age.

Because I believe this evidence is sufficient to establish a claim of age discrimination under RCW 49.60.180, I would

affirm the decision of the trial court denying the Defendants' motion for judgment n.o.v.

[SIGNED]

I concur, [handwritten]
[Signed]

I concur, [handwritten]
[Signed]

APPENDIX "B"

[Beginning of Transcript Page 556]

are on that truck, there were some missing and I don't believe they're on there." Well, I stopped on the freeway again, I got out, walked clear around and checked, probably the third time I checked that morning, and I thought maybe I overlooked them again, so I went around again and I never did find them missing on my truck. I don't -- a mechanic must have stuck them on the night before. I don't know. I never did see them missing. I don't know how I overlooked them when I washed the truck. We do have a chrome cap that sits on top of the lug nuts and I thought maybe that had fallen over. I thought that's what they were talking about because the lug nuts were all there. I never did see them missing.

Q. Did you think there was any connection between this letter and your complaints about the routes?

A. It's a good possibility. That and that I was the new union negotiator for the union, helping them out with that. It could be because I was complaining that some of my containers were stuck in mud, that I couldn't move them, and that I had been complaining that the routes were too long.

Q. Up in Buckley?

A. In the Buckley route, yes.

Q. Maybe we should clarify; when you say the Buckley route, *[end of page 556]*

[Beginning of Transcript Page 558]

asked him, "What do you do with it after you write it down?" He said, "Take it in the office."

Q. Just tell us what you did.

A. Okay. Well, anyway, like I said, I asked Chris. I went in the office, set it down on the desk, because none of the bosses was there, it was for three hours of overtime at that time, and I proceeded home. I did my book work and I went home.

Q. Had you worked the three hours of overtime?

A. Yes.

Q. You kept track of it during the week?

A. That week I did.

Q. What happened with that request?

A. Well, somebody gave it, I imagine, to Mr. Hawkins because Mr. Hawkins called me in the office probably the following week and wanted to talk to me about it, discuss it with me.

Q. Was there anybody else in the office when Mr. Hawkins called you in?

A. On that I don't believe so.

Q. What happened during that conversation?

A. Oh, Don went in and talked to me. He said, well, Mike we're going to pay for your overtime. And I said, yeah, that's fine. I says, "What about all the other hours I've worked too? Can I get paid for any of that?" He *[end of page 558]*

[Beginning of Transcript Page 593]

Q. Mr. Rogge, I want to make sure the record is clear as to what your overtime activities were. Am I correct to state that the only time you ever turned in overtime was in late August or early September, 1988?

A. Yes.

Q. And you turned in three hours overtime, right?

A. Yes.

Q. And you got paid for that?

A. Yes.

Q. And you never turned in overtime before that?

A. No.

Q. And you didn't turn in overtime after that?

A. No. Well, no, I was on the time clock. I believe there was a couple hours on the time clock that I got paid for.

Q. If there was overtime you got paid for it without asking, right?

A. Yeah, after the time clock.

Q. And you never filed a grievance over overtime.

A. Just with that class action suit they were talking about filing for all of us.

Q. Did you file?

A. Personally, no.

Q. You never filed anything?

A. I did not file anything, no.

Q. You were never told by the company that you wouldn't be *[end of p. 593]*

[Beginning of Transcript Page 1112]

number two?

A. "Notify supervisor immediately." That was number one. Number two, "An injury or accident, no matter how slight, should be reported immediately to your immediate supervisor."

Q. You did not report the accident on September 22, or whatever date this September accident was, immediately to your supervisor, did you?

A. As I explained, sir, there is a dead space in this area. I tried to call in several times. I got no answer. Because I got no answer, and I was in this area for the first time, I assumed I could not get through, So, yup, the answer is, yes, I did not report it immediately because I could not.

Q. You reported it at the end of the shift, not immediately?

A. That's correct, sir.

Q. So you violated that rule, isn't that true?

A. That would be correct, sir.

Q. And you got a warning letter for violating that rule.

A. Yes, I did.

MR. GRIMM: Nothing further, Your Honor.

THE COURT: Ms. Barnard, any other questions?

(Whereupon, Plaintiffs' Exhibit No. 146 was marked for identification.)

[End of p. 1112]

[Beginning of Transcript Page 1164]

A. Not then, no. I believe it was a little later on in September when I believe a few of us were paid back overtime.

Q. Now, just about this time, that is August 29th, 1988 to September 2nd, 1988, was overtime being discussed among the employees?

A. Yeah, there were drivers down there discussing the overtime situation.

Q. Were there any meetings among the drivers to discuss the situation?

A. Yeah, we had a meeting at the union hall; just basically called a general meeting to air out some complaints about things that were going on. .

Q. Was there one meeting or more than one meeting?

A. I believe there was two meetings. I think there was one like the 15th of August and another one right at

the very end of August, the last day, the 31st or somewhere in that area.

Q. What generally, without quoting what other people say, generally what happened at those meetings?

A. Well, we just aired our complaints about the size of routes, the fact, you know, we had to run, skip lunch to get them done, and we were going to file overtime and we weren't being paid. Just the problems that were coming up at the workplace. *[End of p. 1164]*

[Beginning of Transcript Page 1247]

A. Yes.

Q. And you got paid for all the overtime you worked, whatever it was.

A. I believe right after the time clock came in I might not have gotten a small portion one time. But after that, yes, I received it.

Q. There was never any dispute after that about overtime that you had coming or getting paid for.

A. No, whatever was on the timecard I was paid for.

Q. You said that you heard that there was something going on with the Department of Labor & Industries in 1988 but you didn't know what it was.

A. I wasn't sure what it was, no. There was rumors.

Q. But you didn't have anything to do with that?

A. I was not involved in the direct process, no.

Q. You were never involved in any Department of Labor & Industry investigation, were you?

A. I was sent questionnaires but I wasn't actually involved.

Q. Now, the route that you handled is Route 5, is that right?

A. Yes.

Q. You had the same route throughout your entire employment?

A. Yes.

Q. As I understand it, you said your Monday, Tuesday and *[end of p. 1247]*

[Beginning of Transcript Page 1272]

A. Any overtime.

Q. How does your shop steward status play into this? You became shop steward in the middle of August. Do you think they were after you because of that too?

A. Well, at first I really didn't think so.

Q. Did you think in September of 1988 that that was the reason?

A. I felt it was probably part of it. I was a go-between for the workers and the union. People brought their overtime complaints to me, and I shop stewarded it, I relayed it on to the union.

Q. Who was the shop steward before you?

A. It was Keith Kovalenko.

Q. Who was the shop steward before Mr. Kovalenko?

A. No idea.

Q. Wasn't it Don Hawkins?

A. Could have been. I have no idea.

Q. Did you stop talking to Mr. Hawkins about this point in time?

A. No.

Q. Did you go to him if you had problems?

A. Yes, I went to him with problems.

Q. You didn't go to him about this letter, though, did you?

A. Well, we had a conversation about it, but I can't exactly tell you what it was.

[End of p. 1272]

[Beginning of Transcript Page 1346]

A. I feel the main reason why I got this onslaught of warning letters was because I filed for overtime. I became shop steward after I filed for overtime and after I complained about my routes, if that had anything to do with it. My main feeling is they didn't want overtime down there. I complained, I went and filed overtime, I got a warning letter, and they continued.

Q. (By Mr. Grimm) You're saying because you filed overtime you got these warning letters. Was another reason that you're contending this is because you were the shop steward?

A. I felt as a go between and people were bringing overtime complaints to me and I was, you know, involved in the other peoples' overtime and stuff it had a small amount.

Q. In fact, you stated in your deposition that every one of those, in answer to every one of those warning letters that you believed they were based in part on the fact that you were a shop steward.

A. In a small part, yeah.

Q. Did you say a small part or in part?

A. I can't remember exactly what I said in my deposition.

Q. Now, you left the company at the end of November, 1989 because you didn't want to throw garbage cans the rest of your life and there was no room for advancement in the company, isn't that true? *[end of p. 1346]*

[Beginning of Transcript Page 1536]

'88, right?

A. Yes.

Q. What event would you say caused the company to start thinking about changing the system and going to a time clock?

A. That would have been the Larry Schwerzler's complaint to Labor & Industries.

Q. This was the complaint that I think Mr. Schwerzler or Ms. Soran testified she came out in June of 1988 and saw you over?

A. That's correct.

Q. Did you meet with her in June?

A. Yes, I did.

Q. What happened in that meeting?

A. Well, basically she had come out to look at our daily time records and found that we had none, and she was not exactly thrilled with that finding and informed me

that we needed to upgrade our way of keeping track of the daily time.

Q. What did she tell you the consequences were of not having records?

A. Well, I don't exactly remember what the consequences were but she told me we were in violation of state law by not having one.

Q. Just not having the records was against the law, is that

[end of p. 1536]

[Beginning of Transcript Page 1537]

what she said?

A. That's correct.

Q. What did you decide to do?

A. We decided at that point that what we needed to do was install a time clock.

Q. Later on in that summer did you start to get some overtime claims?

A. Yes, we did.

Q. When did those come in?

A. Those came in towards the end of August.

Q. Was this unusual?

A. Yes, it was.

Q. Why was it unusual?

A. It was not unusual to get an occasional overtime request, but in late August we, I believe, got nine requests for overtime.

Q. What was your reaction when you got nine overtime requests?

A. My reaction was to contact the union and find out what was going on, because it was apparent we were losing control and I wanted to know what exactly had been said at the meeting that the union had carried on in August.

Q. Who were you dealing with at the union?

A. Cary Bertram.

Q. Apparently there were some grievances filed at the same *[end of p. 1537]*

[Beginning of Transcript Page 1539]

clock?

MR. SCHWERIN: Objection, hearsay.

MR. GRIMM: I think Mr. Bertram has already testified, Your Honor. I'm asking what he told him.

THE COURT: Well, the objection's sustained.

Q. (By Mr. Grimm) Was there any objection to the time clock?

A. No, there was none.

Q. How about the other subject, the route schedules or the policies?

A. There were no objections to the route schedules or the policies, except for the section on the drug and alcohol.

Q. That was something new?

A. That was new that we added at that time, that's correct.

Q. Did you tell the union what you were going to do about the overtime claims?

A. We informed the union that we would pay the overtime claims.

Q. Do you have Exhibit 185 in front of you?

A. Yes, I do.

Q. Is that Mr. Payne's letter to the union confirming that nine people would receive payment for overtime?

A. That's what this is, yes.

MR. GRIMM: Can I get this marked, please?

THE CLERK: Marking Defendants' Exhibit 193. *[end of p. 1539]*

[Beginning of Transcript Page 1540]

(Whereupon, Defendants' Exhibit No. 193 was marked for identification.)

Q. (By Mr. Grimm) Mr. Hawkins, did I ask you to put together a list of the nine people who claimed overtime in September of '88 and the hours that they were paid?

A. Yes, you did.

Q. Mr. Hawkins, I'll show you what we've had marked as Exhibit 193. Can you identify that document for us?

A. That's a list of the nine people and the amount of overtime hours that were paid in the September 16th agreement.

Q. Did you use your payroll records to verify the amount of hours that were involved in those claims?

A. That's correct.

Q. Does this accurately reflect the number of hours that were paid out in September of 1988 to those individuals?

A. Yes, it does.

MR. GRIMM: I'll offer the exhibit, Your Honor.

MR. SCHWERIN: May I have some voir dire, Your Honor?

THE COURT: Proceed.

VOIR DIRE EXAMINATION

BY MR. SCHWERIN:

Q. Mr. Hawkins, precisely what payroll records did you look at to verify the amount of payroll hours? *[end of p. 1540]*